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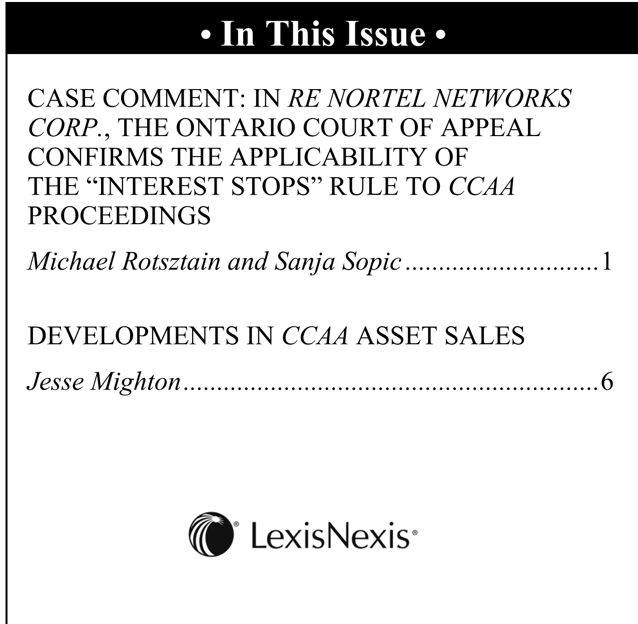
• CASE COMMENT: IN *RE NORTEL NETWORKS CORP.*, THE ONTARIO COURT OF APPEAL CONFIRMS THE APPLICABILITY OF THE "INTEREST STOPS" RULE TO *CCAA* PROCEEDINGS •

Michael Rotsztain and Sanja Sopic
Goldman Sloan Nash & Haber LLP

Introduction

On October 13, 2015, the Ontario Court of Appeal dismissed the Ad Hoc Group of Bondholders' appeal[1] from the decision of the Ontario Superior Court of Justice in *Re Nortel Networks Corp.*[2] The group represents holders of unsecured *pari passu* bonds issued by Canadian and U.S. Nortel corporations under three different bond indentures, some of which were issued by a U.S. Nortel corporation in several tranches and were jointly and severally guaranteed by certain of the Canadian and U.S. Nortel entities (the "Crossover Bonds").

In this case comment, the authors provide a summary of the decision and discuss the Court of Appeal's analysis of the applicability of the "interest stops" rule to proceedings commenced under the *Companies' Creditors Arrangement Act* [*CCAA*].[3] The bondholders have sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada, but the leave application has not been disposed of at the time of the writing of this comment.



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Please address all editorial inquiries to:

Boris Roginsky, Journals Editor
LexisNexis Canada Inc.
Tel. (905) 479-2665; Toll-Free Tel. 1-800-668-6481
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Background

Nortel Networks Corporation and other Canadian debtors were granted protection under the *CCAA* on January 14, 2009. On that date, Nortel Networks Inc. and other U.S. debtors filed petitions under Chapter 11 of the *US Bankruptcy Code*.[4] Under claims procedures in the Canadian and U.S. insolvency proceedings, the bondholders made claims for principal and pre-filing interest against the Canadian and U.S. estates amounting to US $4.092 billion. In the initial order made in the *CCAA* proceedings, the Canadian debtors were ordered to make no payments of principal or interest on amounts owing to any creditors as of the filing date without the Monitor's approval.

Following the worldwide sale of Nortel's assets for approximately US $7.3 billion, a joint trial was directed by the Ontario Superior Court of Justice and the United States Bankruptcy Court for the District of Delaware to determine how the sale proceeds were to be allocated (the "Allocation Trial"). During the Allocation Trial, the Honourable Mr. Justice Newbould ordered that the bondholders' entitlement to post-filing interest be determined. On August 19, 2014, Newbould J. concluded that the bondholders were not legally entitled to post-filing interest. In so doing, he confirmed that the common law "interest stops" rule applies to proceedings commenced under the *CCAA*.[5] The bondholders appealed to the Ontario Court of Appeal (the "Court"), which released its decision on October 13, 2015. The Court's reasons are clear and far-reaching, and unless significantly varied by the Supreme Court of Canada should leave to appeal be granted, provide unambiguous guidance on the interest stops rule to participants in the *CCAA* process.

Issues on Appeal

There were two issues on appeal raised by the appellant bondholders:

1. Did Newbould J. err in concluding that an "interest stops" rule applies in *CCAA* proceedings?
2. If not, did His Honour err in concluding that holders of the bonds were not legally entitled to claim or receive any amounts under the relevant indentures over and above the outstanding principal debt and pre-petition interest?

Positions of Key Stakeholders

On the first issue, the bondholders argued that *CCAA* proceedings are different from other insolvency proceedings as they are not intended to permanently alter the rights of creditors, but are intended to provide the debtor an opportunity to present a plan of compromise or arrangement in an effort to keep the business going. The bondholders submitted that the granting of *CCAA* protection merely stays creditors' rights until a plan of compromise or arrangement is negotiated, and does not affect a creditor's contractual right to accrue interest.[6] They further argued that recognizing an interest stops rule in the *CCAA* proceedings would run contrary to the parties' reasonable expectations, as a *CCAA* plan can provide for the payment of post-filing interest. Finally, the bondholders took the position that applying the interest stops rule in *CCAA* proceedings would have undesirable effects on debtors' and creditors' incentives, as the former could use a *CCAA* filing to obtain an interest holiday, and the latter would have no incentive to participate in *CCAA* proceedings as the stay would not protect their rights.[7] The bondholders also argued that the decisions in *Inter Canadian (1991) Inc. (Trustee of); Canada 3000 Inc., (Re)* [*Canada 3000*][8] and *Re Stelco Inc.* [*Stelco*][9] precluded the application of the rule.

On the second issue, the bondholders objected to the phrasing of Newbould J.'s order, which provided that the bondholders were not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest, on the grounds that it may preclude the bondholders from receiving post-filing interest under a *CCAA* plan.

The Decision

1. Did Newbould J. err in concluding that an "interest stops" rule applies in *CCAA* proceedings?

The Court dismissed the bondholders' appeal, concluding that the interest stops rule applies in *CCAA* proceedings and that post-filing interest was therefore not payable on the bonds in question.

The Court commenced its analysis by referring to the long-established *pari passu* principle in insolvency proceedings that assets of an insolvent debtor are to be distributed equally amongst classes of creditors. In upholding Newbould J.'s decision, the Court reasoned that the interest stops rule, which freezes all claims of unsecured creditors as at the date of bankruptcy, is necessary to achieve the purpose of the *pari passu* principle—fairness to creditors and the orderly distribution of assets.[10]

In considering whether the interest stops rule should apply in *CCAA* proceedings, the Court noted that it had been consistently applied in bankruptcy and winding up cases, even where the relevant legislation might preclude its application, and that the same policy purposes relating to the fair treatment of creditors and the orderly administration of an insolvent debtor's

assets apply to render it necessary in *CCAA* proceedings for several reasons.

First, the Court noted that the harmonization of insolvency legislation has been recognized by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*[11] as a necessary step to ensure consistent treatment of property rights under the *CCAA* and *Bankruptcy and Insolvency Act* [*BIA*].[12] Since the interest stops rule applies in bankruptcy proceedings, the goal of harmonization provides for its application in *CCAA* proceedings as well.[13] Second, and closely related to the first point, the Court followed the Supreme Court's reasoning in *Century Services* and *Sun Indalex Finance, LLC v. United Steelworkers*[14] to the interest stops issue and concluded that preventing the application of the interest stops rule in *CCAA* proceedings would encourage statute shopping, as creditors without a contractual right to post-filing interest would have skewed incentives against reorganizing under the *CCAA*, thus undermining that statute's remedial objectives and resulting in a "race to liquidation".[15]

Third, the Court reasoned that permitting one set of creditors to claim post-filing interest while preventing other sets of creditors from enforcing their rights against the debtor would not maintain the *status quo* and would undermine the *CCAA*'s objectives of equal treatment between creditors while a plan of compromise is being negotiated.[16]

Fourth, if the interest stops rule were held not to apply in *CCAA* proceedings, the resulting "asymmetrical entitlement" to post-filing interest would undermine the key objective of the *CCAA*. Creditors with a right to post-filing interest might be less motivated to compromise than creditors without such a right, making it more difficult to achieve a successful restructuring.[17]

Fifth, the Court emphasized that applying the interest stops rule in *CCAA* proceedings would be consistent with the principle of fairness, in particular in the *Nortel* case. To do otherwise would permit the value of the bondholders' claims to increase by approximately $1.6 billion since the commencement of the proceedings, while those of other unsecured creditors, who were prevented by the *CCAA*-imposed stay from seeking interest-bearing judgments against the debtor, would remain static.[18]

Turning to the bondholders' specific arguments, the Court stated that the existence of an interest stops rule in *CCAA* proceedings would not prevent a *CCAA* plan from providing for post-filing interest, and therefore the Court did not agree with the bondholders that imposing an interest stops rule under the *CCAA* would create a disincentive to participate in *CCAA* proceedings.[19] With respect to the bondholders' argument that the application of the interest stops rule could result in debtors filing for *CCAA* protection to obtain an interest holiday by avoiding the obligation to pay interest, the Court noted that although there may be hypothetical cases where the interest stops rule could bring about an unfairness, *CCAA* courts had in the past been creative in the exercise of the wide discretion bestowed upon them in *CCAA* proceedings and would continue to be in the future.[20] This approach, observed the Court, "would no doubt guide the court should the need arise".[21]

The Court also considered the bondholders' position that the *Canada 3000* and *Stelco* decisions were binding precedents that the interest stops rule does not apply in *CCAA* proceedings. With respect to Supreme Court of Canada's decision in *Canada 3000*, the Court emphasized the importance of considering the factual and statutory context within which the case was decided.

The relevant issue before the Supreme Court was whether interest accrued under the *CCAA* on "unpaid charges", as defined in the relevant legislation governing airports and the commercialization of air navigation. The Honourable Mr. Justice Binnie concluded that a *CCAA* filing does not stop the accrual of interest, but the unpaid charges remained an unsecured claim that did not accrue interest after bankruptcy pursuant to ss. 121 and 122 of the *BIA*.[22] Critically, the Court noted that Binnie J. was not deciding whether the common law interest stops rule would apply to stop the accrual of interest in the absence of the right to interest under the applicable aeronautical legislation.[23]

Turning to the *Stelco* decision, the Court concluded that the statements relevant to post-filing interest in the decision should be read narrowly to reflect the issue before the court in that case—namely, an inter-creditor dispute whereby senior debentureholders sought to recover post-filing interest from junior debentureholders pursuant to subordination provisions in the relevant indenture.[24] The *CCAA* plan accepted by the senior debentureholders did not provide for the payment to them of post-filing interest from Stelco, and the dispute revolved around the senior debentureholders' demand for post-filing interest from the junior debentureholders' share of the proceeds. The court found in favour of the senior debentureholders, concluding that the junior debentureholders could not rely on the interest stops rule to relieve them from the obligation to pay post-filing interest to the senior debentureholders, as the *CCAA* plan itself provided for the continued accrual of interest to senior debentureholders for the purpose of persevering their rights against the junior debentureholders. The Court emphasized that the court in *Stelco* was not being asked to consider the applicability of the interest stops rule to *CCAA* proceedings, as the rule pertains to claims by creditors against the debtor, and not claims between creditors.[25] In that context, the Court concluded that the comment in the *Stelco* decision that there is no persuasive authority supporting an interest stops rule in *CCAA* proceedings was *obiter.*

In response to the bondholders' objections to Newbould J.'s order, the Court concluded that Newbould J.'s order did not prevent the bondholders from seeking or obtaining post-filing interest under a *CCAA* plan, noting that in His Honour's reasons he had indicated that the parties would be free to include post-filing interest payments in a *CCAA* plan.[26]

Conclusion

While recognizing the uniqueness of the *Nortel* insolvency proceedings given their duration and scale, the Court observed in its final comments that the principle of fairness nevertheless requires the application of the interest stops rule to any "*CCAA* process . . . short or long".[27] The Court noted that the determination of legal entitlements amongst creditors at the outset of *CCAA* proceedings is important as it clearly establishes the starting point in the case, and enables all stakeholders and the court to assess what legal claim a creditor has.[28] This is significant, the Court remarked, not only because it determines creditors' voting rights on any proposed *CCAA* plan, but it also ensures that, in assessing such a plan, the parties have a clear understanding of what they are and are not compromising in the plan, and that the courts will be able to consider the plan's fairness.

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[*Editor's note*: **Michael Rotsztain** and **Sanja Sopic** are members of the Goldman Sloan Nash & Haber LLP Restructuring and Insolvency Group, Toronto.]

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1 [2015] O.J. No. 5277, 2015 ONCA 681.
2 [2014] O.J. No. 3843, 2014 ONSC 4777.
3 *CCAA*, R.S.C. 1985, c. C-36, as amended.
4 United States, *Bankruptcy Reform Act of 1978,* 11 U.S.C., as amended.
5 For a summary and discussion of this decision, see Michael Rotsztain and Sanja Sopic, *Case Comment: Re Nortel Networks Corp. and the Applicability of the Interest Stops Rule to CCAA Proceedings,* (2015) 1 Nat. Insol. Rev. 32.
6 *Supra* note 1 at para. 31.
7 *Supra* note 1 at para. 33.
8 *Canada 3000*, [2006] S.C.J. No. 24, 2006 SCC 24.
9 *Stelco*, [2007] O.J. No. 2533, 2007 ONCA 483.
10 *Supra* note 1 at para. 25.
11 [2010] S.C.J. No. 60, 2010 SCC 60.
12 *BIA*, R.S.C. 1985, c. B-3, as amended.
13 *Supra* note 1 at para. 36.
14 [2013] S.C.J. No. 6, 2013 SCC 6.
15 *Ibid*. at para. 51.
16 *Supra* note 1 at para. 40.
17 *Ibid*., para. 41.
18 *Ibid*., para. 43.
19 *Ibid*., para. 45.
20 *Ibid*., para. 48.
21 *Ibid*., para. 48.
22 *Ibid*., para. 66.
23 *Ibid*., para. 69.
24 *Ibid*., para. 80.
25 *Ibid*., para. 82.
26 *Ibid*., para. 94.
27 *Ibid*., para. 98.
28 *Ibid*., para. 100.

• DEVELOPMENTS IN *CCAA* ASSET SALES •

Jesse Mighton
Goodmans LLP

Introduction

The monetization of an insolvent company's assets continues to be an integral feature in many proceedings under the *Companies' Creditors Arrangement Act* [*CCAA*].[1]

This article provides a brief history of asset sales in *CCAA* proceedings before s. 36 was added to the legislation in 2009, outlines the seminal pre- and post-amendment decisions that continue to shape courts' considerations in sale transaction and sale process approval cases, and then discusses additional factors courts have considered in recent decisions, including in "bitter bidder" scenarios.

The Pre-amendment Law

Despite the absence of express statutory authority to do so, courts approved the sale of a debtor's assets outside of the normal course of business in *CCAA* proceedings before s. 36 was added to the *CCAA*. Such approvals were granted on the basis of the court's broad power to impose terms and conditions associated with granting a stay under an initial order (what is now s. 11) and its inherent jurisdiction to fill gaps in the legislation as required by the unique circumstances of each case.[2] In *Re Canadian Red Cross Society* [*Red Cross*], Justice Blair also indicated that it was a term of the Initial Order in that case that the debtor was not permitted to "sell or dispose of assets valued at more than $1 million without the approval of the Court".[3] This, combined with the court's observations regarding its inherent jurisdiction and "gap filling" mandate under the *CCAA*, was sufficient for the court to reject arguments that the *CCAA* court did not have jurisdiction to approve the proposed asset sale in *Red Cross*.[4]

Overview of *CCAA* s. 36

Amendments added s. 36 to the *CCAA* in 2009, effectively codifying the existing common law surrounding court approval of asset sales. Court approval is now mandated under s. 36(1), where a debtor under *CCAA* protection seeks to sell assets outside the ordinary course of business. The legislative intent of s. 36 was "to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse".[5]

The addition of s. 36 removed any doubt as to whether the *CCAA* court possessed the authority to approve sales of a debtor's assets, and provided some guidance to the courts as to what factors should be considered when approving a *CCAA* asset sale.

The core of s. 36 lies within subs. (3), which lists six factors the court must consider in deciding whether to authorize an asset sale transaction:

1. whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
2. whether the monitor approved the process leading to the proposed sale or disposition;
3. whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
4. the extent to which the creditors were consulted;
5. the effects of the proposed sale or disposition on the creditors and other interested parties; and
6. whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

This list is non-exhaustive and was intended to provide substantive direction to the court.[6]

Where the proposed asset sale involves the sale of the debtor's assets to a related party, subs. 36(4) sets out additional factors that a court may consider, after having regard to the factors set out in subs. 36(3):

1. whether good faith efforts were made to sell or dispose of the assets to persons who are not related to the debtor company; and
2. whether the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

While subs. 36(3) provides statutory guidance in assessing the propriety of asset sales, additional factors identified in several pre- and post-amendment cases are frequently cited by *CCAA* judges in sale approval decisions, as set out below.

Common Law Factors

The *Soundair* Test

The four factors set out in *Royal Bank of Canada v. Soundair Corp.* [*Soundair*][7] have been routinely considered in *CCAA* asset sale decisions for more than two decades. The wide application of the *Soundair* test continues despite the unique facts at issue in the case itself. The *Soundair* decision involved an appeal from an asset sale transaction approval order sought by a receiver. The proposed sale involved a unique asset (the going concern sale of an airline). The receiver had not sought approval for the sales process before seeking approval of the sale. In a 2:1 decision, the three-judge panel dismissed the appeal, finding that the receiver did act properly in entering the sale transaction.

The majority identified the relevant considerations in assessing the sale as follows (the "*Soundair* test"):

1. whether the debtor made sufficient effort to obtain the best price and has not acted improvidently;
2. the interests of the parties;
3. the efficacy and integrity of the process by which offers were obtained; and
4. whether there was unfairness in the working out of the process.[8]

Although not outlining any specific factors that should be considered when approving a proposed sales process, the *Soundair* court observed that "the court should not review minutely the process of the sale, when, broadly speaking, it appears to the court to be a just process".[9]

Subsequent decisions have observed that there is some degree of overlap between the *Soundair* test and the factors set out in subs. 36(3).[10] The *Soundair* test continues to inform asset sale process and sale transaction approval decisions to date.

The *Nortel* Test

In determining whether to approve an asset sale process, *CCAA* courts frequently invoke the four-part test set out in *Re Nortel Networks Corporation* [*Nortel*].[11] The debtor companies in *Nortel* sought approval of a sales process in respect of substantial assets, and also sought approval of a sales transaction in respect of certain other of the debtors' assets. In approving both the proposed sales process, and the proposed sale transaction agreement, the court indicated that consideration should be given to the

> […] following factors in determining whether to authorize a sale under the *CCAA* in the absence of a plan:
>
> 1. is the sale transaction warranted at this time?
> 2. will the sale benefit the whole "economic community"?
> 3. do any of the debtor's creditors have a bona fide reason to object to the sale of the business?
> 4. is there a better viable alternative?[12]

These factors are referred to hereinafter as the "*Nortel* test".

The court in *Nortel* also indicated with respect to the sales process approval in that case, that the proposed process would see the debtors returning to court for approval "of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Soundair*".[13]

Although dealing with the pre-amendment *CCAA*, the *Nortel* test has been applied both to the approval of a sales process, and to the approval of a proposed sales transaction in the years since. In *Re Brainhunter Inc*., decided in the same year as *Nortel* (though post-2009 amendments), the *CCAA* Court commented on the proper application of the *Nortel* test:

> Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the *CCAA* is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.
>
> I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale.[14]

Despite these comments, the *Nortel* test continues to be applied both to asset sale transaction approval motions[15] as well as sale process approval motions,[16] and in some non-*CCAA* insolvency cases, for both.[17] For example, in *Re Clothing for Modern Times Ltd.*, the *Nortel* test

is described as "the factors a court should consider when reviewing a proposed sale process under the *CCAA* in absence of a plan".[18] In other instances, the *Nortel* test is cited to the exclusion of any other factors in approving a proposed asset sale transaction. For example, in *Re TBS Acquireco In*c., the *Nortel* test was applied in a motion seeking approval of an asset sale transaction that was the result of a previously approved sale process. In approving the proposed transaction, the court referred only to the *Nortel* test, without referring to the subs. 36(3) factors, or any other common law factors.[19] In light of these more recent post-*Nortel* decisions, it appears that the *Nortel* test may apply to either a sales process approval, or a sales transaction approval, in conjunction with other considerations set out in law, as discussed herein, and, of course, the unique circumstances in each case.

The *White Birch* Test

Shortly following the *Nortel* decision, the Superior Court of Quebec restated the test for approval of a *CCAA* asset sale transaction in *Re White Birch Paper Holding* [*White Birch*]:

> The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons other than those mentioned in Section 36 of the *CCAA* or refuse to grant it for reasons which are not mentioned in the *CCAA*.[20]

This practical approach (the "*White Birch* test") is cited in a number of recent asset sale transaction approval decisions.[21]

Generally, the *Soundair*, *Nortel*, and *White Birch* tests are the most frequently cited cases in *CCAA* asset sale decisions.

Recent Asset Sale Decisions

The courts in some recent s. 36 decisions have considered a combination of factors, including those listed in subs. 36(3), and the *Soundair*, *Nortel*, and *White Birch* tests in approving proposed asset sale transactions and sale processes. Although no discernable pattern has emerged as to which of these common law tests will be applied in various decisions under subs. 36(3), an analysis of two recent decisions indicates that courts are primarily concerned with reaching a fair and reasonable result in the unique circumstances of each case.

Veris Gold

In *Re Veris Gold Corp*. [*Veris Gold*], the Supreme Court of British Columbia approved the sale of substantially "all tangible and intangible assets" of the debtor, a mining company with assets located in Nevada and Yukon who had commenced proceedings under the *CCAA* in B.C. and simultaneous proceedings under Chapter 15 of the *United States Bankruptcy Code* in Nevada.

A sale and solicitation process seeking to sell the debtor's business as a going concern was previously approved by the Court. The sales process concluded with no qualified bids having been received despite an extension of the bid deadline. The monitor was granted expanded power to maintain ongoing operations at the debtor's facilities, and to continue to solicit interest for a transaction in respect of the debtor's assets. The monitor's efforts generated expressions of interest from two parties, both of whom already held economic interests in the underlying assets, and both of whom indicated that they may be prepared to make a credit bid for the assets.

The monitor also consulted with environmental regulators regarding the possibility of an asset liquidation if a going concern transaction could not be achieved.

Ultimately, the debtor entered into an asset sale agreement (the "Veris ASA") with a company controlled by an individual who already held a 20 per cent equity interest in the debtor company, and who held additional royalty interests in the underlying mining assets. The Veris ASA allowed for the continued marketing of the company's Yukon assets and, failing a sale of the Yukon assets within a specified time period, the transfer of those assets to the purchaser.

In approving the Veris ASA, the Supreme Court of British Columbia considered the factors set out in *CCAA* subs. 36(3). The Court indicated that the *Soundair* test was "helpful in considering whether to approve a sale"[22] and that "the principles of *Soundair* remain relevant and indeed overlap with some of the specific factors set out in subsection 36(3)".[23] The court also recognized that "a more general test has been restated, […] namely to consider the transaction as a whole and decide 'whether or not the sale is appropriate, fair and reasonable'".[24] The court concluded in this case that "the proposed transaction is fair and reasonable"[25]—a statement applying the practical approach outlined in *White Birch*.

Bloom Lake

Similar to *Veris Gold*, the court in *Re Bloom Lake* [*Bloom Lake*] also considered each of the subs. 36(3) factors, the test in *White Birch*, and the *Soundair* test in approving a sale of the debtor company's assets. In addition to these factors, the court in *Bloom Lake* also applied considerations enunciated in the earlier decision of *Re AbitibiBowater Inc.*:

> The Court must give due consideration to two further elements in assessing whether the sale should be approved under Section 36:
>
> 1. the business judgment rule […]
> 2. the weight to be given to the recommendation of the Monitor.[26]

Bitter Bidder Issues

Also at issue in *Bloom Lake* was the role of a losing bidder in the *CCAA* process on the approval of the asset sale transaction—a "bitter bidder" scenario—as a prospective purchaser who had been unsuccessful in the sales process filed an objection and made oral submissions in the transaction approval motion.

Generally, appellate level jurisprudence has held that an unsuccessful bidder in a sale process does not have standing to challenge a sale approval order.[27]

In *Bloom Lake*, the debtors did not obtain approval before engaging in the sales process. As the Court pointed out, "there is no legal requirement that the sale process be approved in advance, but it creates the potential for the process being challenged after the fact, as in this case".[28]

The unsuccessful bidder challenged the sales process on the basis that the successful bidder had been offside the bid requirements on a strict reading of the rules established by the monitor, the debtors, and their advisors. The unsuccessful bidder's complaints centred on technical deficiencies in the successful bid. Indeed, the record revealed certain "relatively minor" issues with the successful bid. For example, the cover letter was not signed, the bid was amended in the hours following the 5:00 p.m. filing deadline to confirm that third-party consents had been obtained, and the executed transaction agreement was also submitted several hours past the filing

deadline as a result of the delay in obtaining third-party consents.

Despite these perceived procedural deficiencies, the Court rejected the unsuccessful bidder's arguments and held that "this is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process was fair. It was not perfect, but the Courts do not require perfection".[29]

The court in *Bloom Lake* stated that "perhaps the way to reconcile all of this is to exclude the losing bidder from the Court approval process and instead require the losing bidder to make its complaints and objections to the monitor. The monitor would then be required to report to the Court on any such complaints and objections".[30] This practice direction is aimed at addressing the underlying policy issue that "a losing bidder is not seeking to promote the best interests of creditors, but is looking to promote its own interests".[31]

However, the Court's suggestion in this case appears impractical, and may actually encourage the mischief it attempts to avert. An objecting unsuccessful bidder could report an objection to the monitor at the last minute, which may delay proceedings if the monitor is required to issue a report on the objection. Such delays would likely prejudice other stakeholders, and may imperil the underlying transaction in certain circumstances.

Indeed, *Bloom Lake* itself reveals that the Court's suggestion did not consider the impracticalities of timing considerations. In *Bloom Lake*, the monitor did file a report outlining the constitutional and procedural objections of certain First Nations bands objecting to the sale.[32] However, after this report had been filed, the unsuccessful bidder in the sales process filed an intervention with respect to the scheduled approval motion, and there was no opportunity for the monitor to file a supplemental report, barring the postponement of the transaction approval.

Read together, the recent decisions *Veris Gold* and *Bloom Lake* suggest that *CCAA* courts continue to apply a practical approach to the question of asset sale approval, considering the unique facts of each case and making a determination based on the particular facts at hand. This practical approach is reflected by the application of the *White Birch* test in each of the recent examples set out above.

Nelson Educational Limited

The recent Ontario Superior Court decision in *Nelson Educational Limited* approved the sale of substantially all of the debtor's assets in a transaction arising out of a sales process that had not been approved by the *CCAA* court, and that had been conducted prior to and outside of the *CCAA* proceedings. The court summarized its finding as follows:

> One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair* principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.
>
> I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements.[33]

In approving both the sales process and the proposed sale transaction, the Court considered the subs. 36(3) factors, the *Soundair* factors, and the *Nortel* test in the circumstances of the case.

Final Thoughts

In some ways, despite the addition of the statutory factors in subs. 36(3), the approval of asset

sale processes and transactions has always been an exercise of the *CCAA* court's discretion based on the unique factors in each case. This notion is reflected in the ongoing application of the practical approach set out in *White Birch* in a number of recent s. 36 cases, as well as the observation that *CCAA* courts refuse to apply the s. 36(3) factors by rote, engaging in detailed fact-driven analyses to determine the appropriate result in each case. Although procedural challenges exist, particularly in balancing the interests of prospective purchasers against other stakeholders in the *CCAA* process, recent cases indicate that *CCAA* courts continue to engage in a considerate and measured exercise when determining how to deal with a debtor company's assets in a *CCAA* context.

Goodmans LLP

[*Editor's note*: **Jesse Mighton** is an associate in the Corporate Restructuring group at Goodmans LLP. Thanks are due to Lindsay Board, an articling student with Goodmans LLP, for her collaborative efforts in bringing this article to fruition.]

[1] *CCAA*, R.S.C., 1985, c. C-36.

[2] *Red Cross,* [1998] O.J. No. 3306, 72 O.T.C. 99, para. 43.

[3] *Ibid*., para. 44.

[4] In approving the proposed asset sale in that case, the *CCAA* court in *Red Cross* applied the four-factor *Soundair* test, as discussed below.

[5] *Re Canwest Global Communications Corp*., [2009] O.J. No. 4788, 183 A.C.W.S. (3d) 325, para. 32.

[6] Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003, Chair: Richard H. Kroft) at 146.

[7] *Soundair*, [1991] O.J. No. 1137, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.).

[8] *Ibid*., para. 47. Note these principles were originally delineated in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (H.C.J.). The *Soundair* test was recently applied in the case of *Re Target Canada Co*., 2015 ONSC 2066, wherein the Ontario Superior Court considered the *Soundair* factors in analyzing the factors under *CCAA* subs. 36(4) regarding to a sale to a related party. The author acts for the Monitor in these ongoing *CCAA* proceedings.

[9] *Ibid*., *Soundair*, para. 15.

[10] *See*, for example, *Re Target Canada Co*., [2015] O.J. No. 1204, 2015 ONSC 1487.

[11] *Nortel*, [2009] O.J. No. 3169, 55 C.B.R. (5th) 229 (Ont. S.C.J. (Commercial List)).

[12] *Nortel*, para. 49.

[13] *Nortel*, para. 53.

[14] *Re Brainhunter Inc*. 2009 CarswellOnt 8207 at paras. 16–17.

[15] *See*, for example, *Re Sino Forest Corp*., [2012] O.J. No. 1499, 2012 ONSC 2063, paras. 40–41.

[16] *See*, for example, *Re Target Canada Co*., 2015 ONSC 846 at paras. 3–5.

[17] *See*, for example, *Clark v. Carson*, [2011] O.J. No. 4626, 2011 ONSC 6256, para. 31; *Schembri v. Way*, [2011] O.J. No. 1594, 2011 ONSC 2041, paras. 35–36.

[18] See *Re Clothing for Modern Times Ltd.,* [2011] O.J. No. 5803, 2011 ONSC 7522, para. 19.

[19] See *Re TBS Acquireco Inc*., [2013] O.J. No. 3211, 2013 ONSC 4663, para. 18.

[20] *White Birch*, [2010] Q.J. No. 10469, 2010 QCCS 4915, para. 49.

[21] *See*, for example, *Re Bloom Lake*, [2015] Q.J. No. 3515, 2015 QCCS 1920 [*Bloom Lake*]; *Re Target Canada Co*., [2015] O.J. No. 1204, 2015 ONSC 1487; *Re Veris Gold*, [2015] B.C.J. No. 1477, 2015 BCSC 1204 [*Veris Gold*].

[22] *Veris Gold*, *ibid*., para. 24.

[23] *Ibid*., para. 25.

[24] *Ibid*., para. 23, citing *White Birch*.

[25] *Ibid*., para. 45.

[26] *Bloom Lake*, citing *Re AbitibiBowater Inc*, [2009] Q.J. No. 19124, 2009 QCCS 6460. Although the court in *AbitibiBowater* did not specifically reference the business judgment rule by name, the Court did observe: "Absent some compelling, exceptional factor to the contrary, the Court should accept an applicant's proposed sales process where it was recommended by the Monitor and supported by the stakeholders" (para 59).

[27] *See*, for example, *BDC Venture Capital Inc. v. National Convergence Inc.*, [2009] O.J. No. 3896, 2009 ONCA 665; *Skyepharma plc v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467, 47 O.R. (3d) 234 (C.A.).

[28] *Bloom Lake*, *supra* note 21, para. 29.

[29] *Ibid*., para. 59.

[30] *Ibid*., para. 86.

[31] *Ibid*., para. 84.

[32] The First Nations bands, although opposing the asset sale transaction in this case, are not considered a "bitter bidder", as they did not participate in the sales process. Although the court indicated that such social stakeholders had been recognized in other cases, it declined to comment further on the facts in *Bloom Lake* (para. 84).

[33] *Nelson Educational Limited*, [2015] O.J. No. 4628, 2015 ONSC 5557, paras. 32–33.